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No. _____,

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1991

THE STATE OF OKLAHOMA,

Petitioner,

v.

GARY WAYNE BURKE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS STATE OF OKLAHOMA

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IN THE SUPREME COURT OF THE UNITED STATES

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THE STATE OF OKLAHOMA,

Petitioner,

v.

GARY WAYNE BURKE,

Respondent.

QUESTION PRESENTED

Whether the Oklahoma Court of Criminal Appeals' ruling that a state statute providing for the admissibility of out-of-court video statements by child abuse victims was unconstitutional should be allowed to stand, where that Court misinterpreted Maryland v. Craig, 487 U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) to hold that the "indicia of reliability" standard regarding hearsay statements can only be satisfied by the opportunity for cross-examination.

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OPINIONS BELOW

In the defendant's direct appeal from an Oklahoma County conviction of first degree rape, the Court of Criminal Appeals reversed and remanded the case for a new trial. The decision of the Court is published at Burke v. State, 820 P.2d 1344 (Okla. Crim. App. 1991). It is from that decision that the State now seeks certiorari review.

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a). Jurisdiction in the Court of Criminal Appeals was pursuant to Okla.Stat. tit. 20, § 40 (1991).

STATEMENT OF THE CASE

Gary Wayne Burke was convicted in the District Court of Oklahoma County, State of Oklahoma, of the crime of First Degree Rape, and was sentenced to thirteen (13) years in prison. He appealed that

conviction to the Court of Criminal Appeals, and on November 1, 1991, that Court reversed Burke's judgment and sentence, and ordered that the case be remanded for a new trial. The State filed a motion for rehearing. On December 9, 1991, in a 3-2 decision, the Court denied rehearing. Certiorari is now sought from that final judgment of the Court of Criminal Appeals which reversed Burke's conviction.

On March 14, 1992, this Court granted an extension of time to file this Petition for Certiorari to and including April 13, 1992.

HOW FEDERAL QUESTION PRESENTED

Although not objected to at trial, on appeal the defendant Burke contended that Okla.Stat. tit. 22, § 752 (Supp. 1986) was unconstitutional because it violated his Sixth Amendment confrontation rights. The Court of Criminal Appeals reviewed for fundamental error and found that the

statute was unconstitutional under the Sixth Amendment. Burke, 820 P.2d 1344, 1345 - 1346. The Court used as precedent for its decision this Court's holding in Maryland v. Craig, 487 U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). Burke, 820 P.2d 1344, 1348.

REASONS FOR GRANTING THE WRIT

The question presented for certiorari review seeks to correct the Oklahoma Court of Criminal Appeals' misinterpretation of federal constitutional law and holdings from this Court regarding the admissibility of out-of-court statements by child sexual abuse victims. The Oklahoma Court held that this Court requires that a child be in court, available for cross-examination, before an out-of-court statement of that child can ever be introduced into evidence.

In the case at bar, the Court of Criminal Appeals held that an Oklahoma statute, Okla.Stat. tit. 22, § 752 (Supp.

1986), was unconstitutional based on the Confrontation Clause to the United States Constitution and this Court's holding in Maryland v. Craig, 487 U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990). In so doing, the Court blatantly misinterpreted precedent from this Court, and effectively barred any out-of-court video statement of a child sexual abuse victim.

The invalidated statute in question provided:

> A. This section shall apply only to a proceeding in the prosecution of an offense alleged to have been committed against a child twelve (12) years of age or younger, and shall apply only to the statement of that child or other child witness.
>
> B. The recording of an oral statement of the child made before the proceedings begins is admissible into evidence if:
>
> 1. The court determines that the time, content and circumstances of the statement provide sufficient indicia of reliability;

2. No attorney for any party is present when the statement is made;

3. The recording is both visual and aural and is recorded on film or videotape or by other electronic means;

4. The recording equipment is capable of making an accurate recording, the operator of the equipment is competent and the recording is accurate and has not been altered;

5. The statement is not made in response to questions calculated lead the child to make a particular statement or is clearly shown to be the child's statement and not made solely as a result of a leading or suggestive question;

6. Every voice on the recording is identified;

7. The person conducting the interview of the child in the recording is present at the proceeding and is available to testify or be cross-examined by any party;

8. Each party to the proceeding is afforded an opportunity to view the recording at least ten (10) days before trial, unless such time is shortened by leave of the court for good cause shown; and

> 9. The child either:
>
> a. testifies at the proceeding, or
>
> b. is unavailable as defined in Title 22 as a witness.
>
> When the child is unavailable as defined in Title 22 as a witness, such recording may be admitted only if there is corroborative evidence of the act.

As can be seen, prior to admission of the statement, Section 752(B)(1) required the trial court to determine that the time, content and circumstances of the statements provided a sufficient indicia of reliability.

The basis for the majority's opinion that Okla.Stat. tit. 22, § 752 (Supp. 1986) was unconstitutional on its face was tripartite. The three infirmities found by that Court were:

> 1. If the child was declared unavailable, the defendant was forever denied any opportunity for cross-examination. Burke, 820 P.2d at 1347.

> 2. There was no built-in indicia of reliability, which the Court declared, could only be achieved by the opportunity for cross-examination. Burke, 820 P.2d at 1348.
>
> 3. The statute permitted a child's in-court testimony to be improperly bolstered. Burke, ibid.

Although the child victim did testify in Burke, the majority's primary objection to Section 752 seemed to be that the child victim might not be available for cross-examination. As it stated:

> [W]e find one of the fatal flaws of 22 O.S.Supp.1986, § 752, to be that if the child is declared unavailable, the defendant will be forever denied any opportunity for cross-examination.

Burke, 820 P.2d at 1347. If this finding of a "flaw" is to be taken literally, no hearsay exception would pass constitutional muster.

In Ohio v. Roberts, 448 U.S. 56, 64, 100 S.Ct. 2531, 65 L.Ed.2d 597 (1980), this Court noted that, while the Confrontation

Clause reflects a preference for face-to-face confrontation at trial, competing interests, if closely examined, may warrant dispensing with confrontation at trial. The holding of Ohio v. Roberts has been modified in the case of United States v. Inadi, 475 U.S. 387, 106 S.Ct. 1121, 89 L.Ed.2d 390 (1986), in which it was held that the unavailability of a non-testifying co-conspirator need not be shown as a condition of admitting his or her out-of-court statements at trial. The Court limited the requirement of unavailability to those cases where the "prosecution seeks to admit testimony from a prior judicial proceeding in place of live testimony . . . ". Inadi, 475 U.S. at 393. Inadi "supports the general proposition that reliable out-of-court statements generally can be constitutionally introduced without producing an available declarant".

Manocchio v. Moran, 919 F.2d 770, 774 (1st Cir. 1990).

The Honorable James F. Lane of the Court of Criminal Appeals was correct in his dissent when he stated, "[i]f we were to adopt this [the majority's] position, all of the hearsay provisions of the Oklahoma Evidence Code would become unconstitutional as well." Burke, 820 P.2d at 1348. As this Court stated in Maryland v. Craig, 487 U.S. ___, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990):

> We have accordingly stated that a literal reading of the Confrontation Clause would "abrogate virtually every hearsay exception, a result long rejected as unintended and too extreme." Roberts, 448 U.S, at 63, 65 L.Ed.2d 596, 100 S.Ct. 2531. Thus, in certain narrow circumstances, "competing interests, if 'closely examined' may warrant dispensing with confrontation at trial."

110 S.Ct. 3157, 3165.

The Court of Criminal Appeals relied on Craig as the basis for its holding in Burke, stating:

> Title 22 O.S.Supp.1988, § 752, does not meet the test of Craig. The statute fails to require (1) oath, (2) the witness to be subject to cross-examination and (3) the right of the jury to observe the witness to determine the demeanor and credibility of same. The statute, on its face, is unconstitutional.

Burke, 820 P.2d at 1348. As the recent case of White v. Illinois, 502 U.S. ____, 112 S.Ct. _____, 116 L.Ed.2d 848 (1992) makes clear, such an interpretation of Craig is erroneous.

> Coy and Craig involved only the question of what in-court procedures are constitutionally required to guarantee a defendant's confrontation right once a witness is testifying. Such a question is quite separate from that of what requirements the Confrontation Clause imposes as a predicate for the introduction of out-of-court declarations. Coy and Craig did not speak to the latter question.

White v. Illinois, 116 L.Ed.2d 848, 860. The Court of Criminal Appeals misused the Craig decision in relying on its holding as a basis for the requirements for the introduction of out-of-court statments.

Although refusing to apply a mechanized test to be used in determining whether or not out-of-court statements contain "particularized guarantees of trustworthiness," and thus fall within acceptable Confrontation Clause parameters, in Idaho v. Wright, 497 U.S. _____, 110 S.Ct. 3139, 111 L.Ed.2d 638 (1990) this Court mentioned several factors, though not exclusive, which could be used by courts in evaluating out-of-court statements. Those factors include the spontaneity and consistent repetition of the child's statements, the mental state of the child at the time of the statement, possible motives for fabrications, and the use of

terminology unexpected of a child of similar age. The Court concluded:

> These factors are, of course, not exclusive, and courts have considerable leeway in their consideration of appropriate factors . . . Rather, the unifying principle is that these factors relate to whether the child declarant was particularly likely to be telling the truth when the statement was made.

110 S.Ct. 3139, 3150. The first requirement of Section 752, in which the trial court evaluates the time and content of the child's statement, properly applies some of the factors above. The additional requirements of Section 752 provide even more safeguards to the defendant, and increase the likelihood that the child's statements are trustworthy. Additionally, the requirement that the statements be both visual and aural allows the trier of fact the opportunity to observe first hand the child's demeanor, readiness or reluctance

to talk, and all other factors which relate to credibility.

In the Wright case, this Court stated:

> Out-of-court statements made by children regarding sexual abuse arise in a wide variety of circumstances, and we do not believe the Constitution imposes a fixed set of procedural prerequisites to the admission of such statements at trial. . . .
>
> [W]e decline to read into the Confrontation Clause a preconceived and artificial litmus test. . .

110 S.Ct. 3139, 3148, and:

> We think the "particularized guarantees of trustworthiness" required for admission under the Confrontation Clause must likewise be drawn from the totality of circumstances that surround the making of the statement and that render the declarant particularly worthy of belief.

110 S.Ct. 3139, 3149. This Court explained that corroborating evidence cannot be used to meet the "indicia of reliability" test, but that the hearsay evidence "must possess indicia of reliability by virtue of its

inherent trustworthiness." Wright, 110 S.Ct. 3139, 3150. As was further explained:

> In Roberts, we suggested that the "indicia of reliability" requirement could be met in either of two circumstances: where the hearsay statement "falls within a firmly rooted hearsay exception," or where it is supported by "a showing of particularized guarantees of trustworthiness."

110 S.Ct. 3139, 3147. Here, because Section 752 is admittedly not a "firmly rooted hearsay exception," the appropriate criteria that should have been used by the majority in the case at bar was whether or not Section 752 contained "particularized guarantees of trustworthiness." In light of the protective requirements provided in Section 752, the State submitted that the statute inherently contained "particularized guarantees of trustworthiness" and therefore met the "indicia of reliability" test.

In drafting Section 752, the Oklahoma legislature built in safeguards to ensure that the "indicia of reliability" standard was met. Those safeguards include a trial court's determination of the reliability of the statement, an opportunity for cross-examination of the questioner, and prohibitions against leading questions. The defendant in this case stipulated that the requirements of Section 752 had been met. Those requirements, on their face, satisfy the criteria set forth by this Honorable Court.

The Court of Criminal Appeals' decision squarely, and blatantly incorrectly, holds that the opportunity for cross-examination is the only method by which the requisite "indicia of reliability" standard can be met.

> Even when the effect of confrontation on a child can be accurately predicted to the extent the child could be classed as unavailable, it is

> still necessary that the recorded testimony carry the necessary indicia of reliability. And, we believe this can only be achieved by giving the accused opportunity for cross-examination.

Burke, 820 P.2d at 1348.

In this case, the video tape of seven-year-old D.L. was taken on February 3, 1987. The sexual abuse occurred on January 27 or 28, 1987. The video tape was made, at the most, four (4) days after the incident. The trial occurred in June, 1987. Surely a statement made by a seven-year-old four (4) days after the event is more reliable than statements taken in an adversarial setting more than four (4) months after the event.

In State v. Gallagher, 554 A.2d 221, 225 (Vt. 1988), the Vermont Supreme Court held that a defendant could not take issue with the trustworthiness of a juvenile's statements when the "trustworthiness" was conceded by defense counsel during hearing

on the pre-trial motions. Such is the case here, where defense counsel stipulated that the statutory requirements of Section 752 had been met. By so stipulating, the defendant conceded that the requisite "indicia of reliability" of the out-of-court statement had been met.

The Court of Criminal Appeals improperly found that the only way that the "indicia of reliability" standard could be met was by an opportunity for cross-examination. That is clearly not the position of this Court. Section 752 contains adequate safeguards to ensure guarantees of trustworthiness, thereby meeting the "indicia of reliability" test, and is thus not unconstitutional on its face.

The Court of Criminal Appeals stands alone in its belief that "indicia of reliability" equates to "opportunity for cross-examination". See e.g. McCafferty v. Leapley, 944 F.2d 445, 451 (8th Cir. 1991);

U.S. v. Taggart, 944 F.2d 837, 840 (11th Cir. 1991); Nelson v. Farrey, 874 F.2d 1222, 1229 (7th Cir. 1989); People v. Diefenderfer, 784 P.2d 741 (Colo. 1989); State v. Stever, 732 P.2d 853, 858 (Mont. 1987). Its decision is not supported by logic nor the precedence of this Court. If Burke is allowed to stand, virturally no out-of-court statements by child sexual abuse victims will be admissible in Oklahoma trials. Such a decision is clearly not dictated by federal constitutional law, is contrary to all other cases on the issue, and perhaps most importantly, the drastic effect that the holding will have on minor victims of sexual abuse cries out for action by this Court.

CONCLUSION

The Court of Criminal Appeals incorrectly applied federal law in holding Okla. Stat. tit. 22, § 752 (Supp. 1986) to

be invalid. This Honorable Court should grant certiorari in order to correct the Court of Criminal Appeal's decision which is wholly inconsistest with past opinions of this Court, and as a matter of public policy to ensure that the statements of children who have been physically and sexually abused are not entirely banned from the courtroom.

Respectfully submitted,

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